

**DATIN ZAINUN BINTI ISMAIL v.
TUAN MINAH BINTI SYED ABDUL RAHMAN
& ANOR.**

[O.C.J. (Mohamed Zahir J.) August 24, 1977, May 10, 1978,
July 9, 1978, October 8, 1978 & February 9, 1979]

[Kota Bharu — Civil Suit No. 55 of 1975]

*Fraud — Plea of non est factum — Claim based on
I.O.U. chits bearing defendants' thumb-prints — Burden of
proof on defendant.*

The plaintiff in this case sued the defendants for \$13,450, interest and costs. She claimed that the said sum was lent to the defendants each of whom had acknowledged receipt of the same on I.O.U. chits of \$6,725 each. The defendants, however, denied that it was a loan. They alleged that the plaintiff was a partner in buying and selling jewellery with the defendants. The defendants claimed that the plaintiff's share in the capital was \$5,000 in cash and that the plaintiff had persuaded the defendants to thumb-print blank I.O.U. notes which the defendants did on the understanding that each I.O.U. would be for an amount of \$2,500 as a security for the said sum of \$5,000.

Held: (1) the burden of proof on fraud is on the defence. It is a general rule that fraud cannot be presumed from mere circumstances or suspicion and the burden of proving the charge of fraud, collusion, misrepresentation and undue influence lies upon the person who seeks to impeach the validity of any transaction on these grounds;

(2) the defendants in the present case had failed to discharge the burden of proof cast on them.

Cases referred to:-

- (1) *Ratna Ammal v. Tan Chow Soo* [1967] 1 M.L.J. 296.
- (2) *Nederlandsche Handel-Maatschappij N.V. (Netherlands Trading Society) v. Koh Kim Guan* [1959] M.L.J. 173.
- (3) *Mercantile Credit Co. Ltd. v. Hamblin* [1964] 3 W.L.R. 798.
- (4) *Muskham Finance Ltd. v. Howard & Anor.* [1963] 1 Q.B. 904.
- (5) *Gallie v. Lee* [1968] 2 All E.R. 322.

CIVIL SUIT.

P. Dorairaj for the defendants.

Plaintiff in person.

Cur. Adv. Vult.

Mohamed Zahir J.: The plaintiff sued the defendants for the sum of \$13,450, interest and costs. She claimed that this was money lent to the defendants who had acknowledged receipt of the same on I.O.U. chits of \$6,725 from each defendant. Both I.O.U. bear the same date, October 14, 1974. In her statement of claim, the plaintiff pleaded that she was a housewife and this was admitted by the defendants who also admit that they themselves were business-women on part time.

The amended defence deny that it was a loan, but alleged that the plaintiff was a partner in buying and selling jewellery with the defendants in or about 1974. The plaintiff's share in the capital of the said business, as alleged in the defence, was \$5,000 in cash. It was further pleaded that as a result of a failure of the business, the plaintiff through persuasion requested the defendants to thumb-print blank I.O.U. notes which the defendants did on the understanding that each I.O.U. would be for an amount of \$2,500 as a security for the sum of \$5,000 deposited by the plaintiff being her share in the business. The defendants pleaded on the material point in this manner:

A "The first and second defendants aver that the \$6,725 claimed from each of them by the plaintiff has been done by fraudulent means. The first and second defendants plead non est factum as to the contents of the two I.O.U. notes marked as "A" and "B". The first and second defendants put the plaintiff to strict proof on the two I.O.U. notes and on the figure of \$6,725."

B The defendants further alleged that the plaintiff issued eight post-dated cheques, four of which had been dishonoured. The defendants then went on to plead as follows:

"The plaintiff subsequent to the dishonour of the cheques contributed in cash the amount of \$5,000 referred to in paragraph 2 of this defence."

C The \$5,000 was the sum of money alleged to be the plaintiff's contribution towards the partnership business and this was the money for which the defendants alleged they, through persuasion of the plaintiff, did thumb-print on the I.O.U. chits on the understanding it was for \$2,500 after the business being unsuccessful.

D It would appear that the defence is fraud and *non est factum*. No particulars of fraud were pleaded as required under Order 19 rule 6(1) of the Rules of the Supreme Court. The plaintiff's counsel at the start of the hearing raised this point. I overruled him. I think particulars on the defence of *non est factum* were sufficiently furnished. On page 109 of *Chitty on Contracts*, 23rd Edition, it states as follows:

E "In most of the cases in which non est factum has been successfully pleaded, the mistake has been induced by fraud. But the presence of fraud is probably not a necessary factor. As Byles J. said in *Foster v. Mackinnon*, 'it is invalid not merely on the ground of fraud, where fraud exists, but on the ground that the mind of the signor did not accompany the signature; in other words, that he never intended to sign, and therefore in contemplation of law never did sign, the contract to which his name is appended'."

F Thus, it would appear that the defendants might allege in the defence the plea of *non est factum* alone and that fraud might not be present.

However from the defence, fraud as pleaded was a prelude to the plea of *non est factum*, although the word "persuasion" instead of "misrepresentation" was used. It should have been pleaded that the plaintiff by misrepresentation in that the I.O.U. chits were for \$2,500 induced the defendants to thumb-print the blank forms of I.O.U. and which the defendants did intending them to be \$2,500 each. On page 244 of *Mallal's Supreme Court Practice* it states as follows:

G "It is not necessary that the word 'fraud' should be used in the pleading, it is enough if it is stated distinctly that fraud is charged."

H In this case "fraud" is used and I consider the circumstances alleged in the defence to be sufficient so as not to take the plaintiff by surprise or to embarrass her.

I The plaintiff in her evidence stated that the defendants came to her house and sought the help to "roll their business" in buying and selling jewellery. She gave them on diverse dates eight post-dated cheques. Four cheques when presented to the bank were dishonoured and the other four were not presented at all. The plaintiff further alleged that during the end of September and early part of October 1974, the defendants came again to borrow money from her for a sum of \$13,000. She agreed to lend them the mo-

ney and in order to obtain the money charged her land to one Hajjah Meriam. She said she received a sum of \$15,000 from the said Hajjah Meriam on October 14, 1974 and this is the date in the I.O.U. She then paid \$6,725 to each of the defendants leaving a sum of \$1,550. She took no receipts from the defendants and when she related this to her husband later, he asked whether she received any security from the defendants. She replied "No". The husband, a Police Constable, got angry with her and took her to a solicitor's office and saw a lawyer's clerk, Nik Aziz, who then armed with I.O.U. forms went, after collecting 1st defendant at her house, to the house of the 2nd defendant and the I.O.U. were thumb-printed by both defendants willingly after being first filled and explained to them. This Nik Aziz was called and identified by the plaintiff in the course of her giving evidence but she at the adjourned date of hearing failed to call him to support her evidence. She further alleged that letters were sent to the defendants (PB 8, 9, 10 and 11) for the repayment of the loan but the defendants had failed to comply therewith. Letters PB8, PB10 were sent by the plaintiff's solicitors and they were registered. Letter PB12 was sent by the plaintiff personally and according to her it was registered. The defendants did not reply to any of these letters although there were acknowledgments of receipt by the defendants of the solicitors' letters. The plaintiff denied she was a partner of any business with the defendants.

The plaintiff further alleged that on October 24, 1974 the 1st defendant went to Hajjah Meriam and took a further sum of \$5,000 from Hajjah Meriam by saying it was on her (plaintiff's) behalf. But it would appear she is not making any claim on this sum of \$5,000 on the 1st defendant but only on the I.O.U. chits.

The plaintiff produced evidence which were admitted by the defence that she charged her land to Hajjah Meriam on October 14 (PB2) and also a signature of the 1st defendant underneath \$5,000 and the date October 24, 1974 besides the figures (PB1) which appear to have been written by the same person. The defence admitted receiving this sum and the 1st defendant admitted signing PB1 and I came to the conclusion that the date the sum of \$5,000 was received was October 24, 1974.

There were also evidence adduced by the plaintiff as to how her eight cheques came to be in the hands of the defendants. I myself feel unsatisfied as to her story as to how she parted with these cheques. She even alleged the defendants stole five of the cheques which had been signed by her. On the balance of probability, I am of the opinion she gave these cheques to the defendants. But, I am of the opinion, this fact has little bearing to the issue of this case, that is, whether the defendants in thumb-printing the I.O.U. chits did not know them to be for higher amounts.

The defendants in their evidence stated that the plaintiff gave the eight post-dated cheques on two occasions, four on each occasion, for the purpose of doing business in jewellery. Their evidence was not

A convincing on this point. There was no account book produced as evidence although I did not expect the defendants being kampong business-women to keep proper accounts. But 1st defendant stated that she did keep an account and that the book was at home. This means it was not produced. There being no evidence of partnership except mere allegation by the defendants I came to the conclusion that there was no partnership between the parties.

B They also introduced evidence that the plaintiff in getting their thumb-print used force although this was not pleaded. 1st defendant stated "by force" she meant that the plaintiff asked her to go to the 2nd defendant's house for the thumb-printing even though at that time she was cooking. 2nd defendant stated the plaintiff forced her as the plaintiff wanted to have the thumb-printing quickly. As I stated, force was not pleaded but even if it was pleaded with these evidence I do not consider them as constituting force.

C The burden of proof on fraud is on the defence. D It is a general rule that fraud cannot be presumed from mere circumstances or suspicion and the burden of proving the charge of fraud, collusion, misrepresentation and undue influence lies upon the person who seeks to impeach the validity of any transaction on these grounds (*Sarkar* on Evidence, 12th Edition page 893). Section 102 of the Evidence Act provides that the burden of proof in a suit or proceedings lies on that person who would fail if no evidence at all were given on either side.

E I come to the conclusion that the defendants had failed to discharge the burden of proof cast on them. I think it would be simpler if I were to tabulate my grounds:

F (a) There was no evidence by the defendants that they had insisted that the plaintiff or her husband to fill the forms first before they thumb-printed. As I stated earlier, I do not think there was sufficient force to deter them from requiring the plaintiff from doing so. They could even refuse to produce their identity cards.

G (b) If the amount of dishonoured cheques was for \$4,000, why a further sum of \$1,000 was included in the I.O.U.? The sum of \$5,000 had therefore no bearing to the dishonoured cheques which they claim it did. 1st defendant stated the reason the plaintiff paid her \$1,000 extra even though there were \$4,000 on dishonoured cheques was because 1st defendant wanted to buy goods with the sum of \$1,000. I find it difficult to believe this evidence.

H (c) The defence evidence on the act of thumb-printing itself gives rise to a suspicion that it did not occur in the manner alleged. It was alleged by 1st defendant that PW3, the plaintiff's husband, asked for the identity cards, saw them and returned without writing on any other paper the particulars of I/C. If this is to be the case, how could the plaintiff remember the particulars of the Identity Cards later which were correctly filled up in the I.O.U. chits? Even the address of 1st defendant, the old address, was written in the I.O.U.

I

- (d) 1st defendant denied receiving A.R. letters from the solicitors for the plaintiff demanding \$6,725 from her (PB8) whereas this was acknowledged by her on PB9 in admitted bundle. 2nd defendant received a similar letter of demand and there was no reply from both or any of them. **A**
- (e) There is no clear evidence by the defendants that the plaintiff misrepresented to them that the I.O.U. was for \$2,500 each. The nearest evidence to this effect was by 1st defendant when she stated that the plaintiff forced her and 2nd defendant to thumb-print the I.O.U. as they took her money in the sum of \$5,000 but later added that she thought it was for \$5,000. The other statement by her was to the effect that the plaintiff told her she had to pay the sum of \$5,000. But further on she stated she thumb-printed because she thought the plaintiff had written \$2,500 on the I.O.U. The 2nd defendant did not disclose any evidence of misrepresentation on the part of the plaintiff. **B**
- (f) The evidence by the 1st defendant who stated in this manner: "if it was for \$5,000 I would have signed without any force used" and the evidence of 2nd defendant who stated that the plaintiff forced her as the plaintiff wanted the thumb-print quickly and she believed it to be in the sum of \$2,500. Now the question is this: if they did thumb-print the chits willingly believing them to be \$2,500 each, then why should there be any element of force present? **C**
- (g) The time of the thumb-print is quite important. The I.O.U. chits were both dated October 14, 1974. The plaintiff stated she paid the sum of \$6,725 to each defendant in the morning of October 14, 1974, after she received the money from Hajjah Meriam after charging her land on the same date. She produced evidence (PB2) of the charge and the defendants admitted taking the money from Hajjah Meriam. In the defence there was no evidence adduced to say that October 14, 1974 was not the date of thumb-print. So I accept it to be October 14, 1974. Now there are two defects in the defence here: **D**
- (i) If the receiving of \$5,000 by the defendants was on October 24, 1974 as evidenced by PB1 and admitted by the defence, the date of the promissory note must be later than October 24, 1974 because the defendants alleged that the I.O.U. was to cover this sum of \$5,000. But the date of the I.O.U. is October 14, 1974. The defence story is therefore not consistent. **E**
- (ii) Again, the defendants alleged in their evidence and defence that the plaintiff agreed and paid \$5,000 after the last dishonoured cheque dated November 26, 1974 was returned to them. She paid, according to them, because these four cheques totalling \$4,000 were dishonoured. The extra \$1,000 was paid because according to 1st defendant she wanted to buy goods. Now the date of receipt of \$5,000 was October 24, 1974. Again **F**
- there is an inconsistency as the date of the last dishonoured cheque was November 26, 1974. I consider this grave as to indicate the whole defence a fabrication. **G**
- Thus, I am of the opinion that the defendants have failed to discharge the onus of proof on them. **H**
- In *Ratna Ammal v. Tan Chow Soo*⁽¹⁾ it was held that a high standard of proof was required where fraud was alleged. Azmi C.J. (as he then was) in this case quoted Rose C.J. in *Nederlandsche Handel-Maatschappij N.V. (Netherlands Trading Society) v. Koh Kim Guan*⁽²⁾ as follows: **I**
- "Whatever the precise formula adopted and whatever the theoretical position may be, it has long been the practice in countries where the English system of law operates for the courts, in civil cases, to require a high standard of proof in cases where fraud is alleged."
- The plea of *non est factum* is not strictly applicable where one person signs a document in blank and hands it to another, leaving him to complete the details and complete the transaction. In *Mercantile Credit Co. Ltd. v. Hamblin*⁽³⁾ where the owner wanting to raise a loan on security of a car signed hire purchase documents in blank believing them to be mortgage documents. There were no misrepresentations by the dealer to induce such belief. It was held that a plea of *non est factum* could not succeed in the absence of any misrepresentation.
- In the instant case, I am not satisfied that there was any such misrepresentation. In the defence there were no particulars of misrepresentation but only alleging the belief of the defendants in thumb-printing the I.O.U. chits to be in the sum of \$2,500 each.
- In the case of *Muskham Finance Ltd. v. Howard & Anor.*⁽⁴⁾ it was held that the doctrine of *non est factum* applied only where there was a mistake as to the class and character of a document, but not where the mistake was simply as to its contents. Donovan L.J. stated at page 912 as follows:—
- "The plea of *non est factum* is a plea which must necessarily be kept within narrow limits. Much confusion and uncertainty would result in the field of contract and elsewhere if a man were permitted to try to disown his signature simply by asserting that he did not understand that which he had signed."
- In *Gallie v. Lee*⁽⁵⁾ where the plaintiff gave deeds to her nephew but a document was prepared to be a sale to the defendant the House of Lords rejected her claim which was based on *non est factum*. In this case elements of fraud were present on the part of the defendant.
- In our instant case, both defendants knew that they were thumb-printing I.O.U. chits, only that they were saying that they were thumb-printing \$2,500 and not \$6,725 each. In other words, if accepting their allegations to be true, their mistake was only as to the contents. Further, it was difficult to conceive the defendants' mind, after readily executing the I.O.U. chits the obligation of which they fully understood to be heard to say they were not obliged to repay because of the existence of a partnership. If this were to be the case why did not they ask the plaintiff to prepare a proper document for repayments to be made only after collections received from the buyers?

Now, let me turn to the plea of *non est factum* without any element of fraud. The law on this appears to be that where an illiterate alleged to have executed a document denies execution for a certain sum but admits executing a document believed to be for a lesser sum, the onus is on the plaintiff. The initial burden of proving execution when it is denied is upon the person alleging execution. An admission by the defendant regarding signature or thumb mark does not amount to admission of execution of document as to shift the onus of proof on the defendant. This is particularly so when the defendant pleads that he signed a blank document (see *Sarkar* on Evidence, 12th Edition page 893).

From the above, it was pointed out that there was a conflict of opinion as to the burden of proof when a person admits his signature on a document but sets up the defence that he signed it blank and by doing this he relies on the exceptional circumstances and so the burden of proof must rest on him. But in the majority of cases very slight evidence would be necessary (see *Sarkar* on Evidence, 12th Edition page 893).

In the case before me, I do not think that the defendants are fully illiterate. 1st defendant stated she could write and read. The 2nd defendant knows only Jawi script but she also stated she knew what I.O.U. chits were, which she described to be "a letter denoting loan". Both defendants are businesswomen. 1st defendant stated she kept an account book. 2nd defendant could sort out in the court which cheques were dishonoured and which were not. Both of them knew so much about post-dated cheques. Thus, the illiteracy exception does not strictly apply to them. Even if it does, I am of the opinion that the plaintiff has sufficiently proved her case in that the defendants did execute the documents and both of them fully knew the contents and the obligations thereof.

In the circumstances, I gave judgment in favour of the plaintiff as prayed and costs.

Claim allowed.

Solicitors: *P. Dorairaj & Co.*

PUBLIC PROSECUTOR v. YAP KIAN NAM

[A.Cr.J. (Gunn Chit Tuan J.) February 15, 1979]

[Penang — Criminal Appeal No. 26 of 1977]

Gaming — Competition in connection with trade or business — Success depending on chance and not to a substantial degree on skill — Guessing game — Common Gaming Houses Ordinance, 1953, s. 4.

Criminal Law and Procedure — Gaming — Guessing game — Common Gaming Houses, Ordinance, 1953, s. 4.

The respondent conducted a competition at a supermarket called "Guessing the amount (*sic*) of National Batteries." The batteries were mixed with plastic discs. The learned Magistrate acquitted the respondent as he held that the competition did not involve mere guess work but required a certain amount of skill. The Public Prosecutor appealed.

Held: (1) on the facts there was no skill involved in the competition conducted in this case;

(2) it would be an offence under section 4(1)(h)(ii) of the Common Gaming Houses Ordinance, if any competition was

conducted in connection with any trade or business where success in it did not depend on the exercise of a considerable amount of skill.

Cases referred to:-

- (1) *Arumugam v. Rex* [1947] M.L.J. 45.
- (2) *Sheo Swarup & Ors. v. King a Emperor* (1933-34) L.R. 61 S.A. 398.
- (3) *News of the World Ltd. v. Friend* [1973] 1 All E.R. 422.
- (4) *Witty v. World Service Limited* [1936] 1 Ch. D. 303.
- (5) *Terry's Motors Limited v. Rinder* [1948] S.A.S.R. 167.
- (6) *Palser v. Grinling* [1948] A.C. 291.

CRIMINAL APPEAL.

Hashim bin Datuk Haji Yusoff (Deputy Public Prosecutor) for the appellant.

Lim Ewe Hock for the respondent.

Gunn Chit Tuan J.: The respondent, Yap Kian Nam, who is the managing director of the Bukit Mertajam Supermarket Sendirian Berhad was charged as follows:—

"That you on October 15, 1974, at the premises of the Bukit Mertajam Supermarket Sdn. Bhd., Bukit Mertajam, in the district of Bukit Mertajam, in the State of Penang, conducted in connection with the business of the said Bukit Mertajam Supermarket Sdn. Bhd., a competition, to wit, 'Guessing the Amount of 'National' Batteries', success in which does not depend to a substantial degree upon the exercise of skill, and that you have therefore committed an offence contrary to and punishable under section 4(1)(h) of the Common Gaming Houses Ordinance, No. 26/53."

The evidence, as recorded by the Magistrate's Court at Bukit Mertajam, shows that since the first of September 1974 the said supermarket at Bukit Mertajam had been conducting a competition called "Guessing the amount (*sic*) of 'National' batteries". When the Acting O.C.P.D. Bukit Mertajam (PW1) raided the supermarket on a search warrant he found that the competition was still in progress and saw a male Indian called Singaraveloo s/o Karuppiah (PW4) writing on some forms at a counter table in the supermarket.

The supervisor of the supermarket called Kuan Liew Choon (PW7), who was also called as a prosecution witness, confirmed that the supermarket had started the said competition on the first of September 1974. The competition rules were printed in three languages, namely Bahasa Malaysia, Chinese and English, on pamphlets (see Exhibit P15B) which were distributed together with entry forms similar to the ones which were produced in court and marked Exhibit P15A and P16. One entry form was given to each customer for every purchase of \$3.00 and a customer could, according to the amount of his purchases, obtain and submit more than one entry form before the closing date for the competition on December 31, 1974. On each of the entry forms similar to the ones produced, a customer must fill in his name, identity card number and address and there is a space opposite the words "I guess" in which he must fill in the number of batteries, which according to his estimate, is in a plastic container which was seized by the Acting O.C.P.D. and produced in court. (Exhibit P9).

At the close of the case for the prosecution the learned Magistrate quite rightly found on the evidence